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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
)
Children's Television Obligations)
of Digital Television Broadcasters)

MM Docket No. 00-167 /

COMMENTS OF CME, *et al.*

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SUMMARY

The Center for Media Education and the other groups and individuals joining these comments (“CME, *et al.*”) commend the Commission for issuing a Notice of Proposed Rule Making (“NPRM”) concerning the obligations of digital television (“DTV”) broadcasters to serve children. As television enters its transition to digital, it is vital that the Commission set the ground rules now for how broadcast licensees can use the enhanced capabilities of DTV to better serve the educational needs of our nation’s children. It is equally important that the Commission adopt regulations to ensure that children are adequately protected from excessive and unfair advertising practices made possible by interactive digital technology.

CME, *et al.* urge the Commission to adapt existing children’s television programming obligations to capitalize on the opportunities presented by DTV. DTV offers great potential for broadcasters to better serve the educational needs of children. With DTV, broadcasters will have the ability to multicast multiple streams of programming, broadcast in high definition television, datacast large amounts of data, and/or broadcast enhanced interactive programming. Broadcast licensees’ responsibilities should be commensurate with these new capabilities. In light of these possibilities, and the continuing unmet needs of children, the current three-hour programming guideline is a poor return for our nation’s children.

Thus, in addition to the three-hour guideline (which would apply to the primary channel), CME, *et al.* recommend that the Commission adopt a new processing guideline for digital broadcasters based on a point system. The point system would provide broadcasters with a set of flexible options for fulfilling their public interest obligations to children. Under this proposal, the Commission would credit a broadcaster with points for: (1) airing additional educational

programming; (2) funding children’s educational programming on a local public television station; and/or (3) providing datacasting services to local schools. Broadcasters would be required to file an annual form with the Commission describing how they have met the point threshold in the previous calendar year.

Because digital and analog broadcasters will continue to provide educational children’s programming, CME, *et al.* urge the Commission to clarify how often a program can be preempted and still be considered a “regularly scheduled” children’s educational program. With respect to analog broadcasters, we recommend that the Commission set a cap for the number of times a program can be preempted and still count toward the guideline. As digital technology gives broadcasters the flexibility to schedule around the regularly scheduled core children’s programs, the need for *any* preemptions should eventually be eliminated.

While ensuring that digital broadcast licensees meet the educational and informational needs of children, the FCC should also ensure that digital licensees do not engage in excessive and unfair advertising in children’s programs. To that end, the Commission should apply the existing commercial limits and advertising policies to all DTV programs aimed at children twelve and under regardless of whether the program stream is free or pay.

The Commission must also clarify how its existing advertising rules and policies apply to the interactive capabilities of digital technology. CME, *et al.* are concerned about the potential for advertisers to take advantage of children’s trusting nature and inability to distinguish commercials from programming through the use of interactive advertising, interactive product placements and targeted advertising. The Commission should clarify that a direct link to a commercial website during a children’s program, or commercial aired during such programming,

would violate the Commission's advertising limits and policies. It should also make clear that DTV broadcasters cannot use interactive data collection techniques to target ads to children.

In addition to adapting its advertising policies to address the dangers of DTV, the Commission should clarify and revise its definition of commercial matter for the purposes of the children's commercial limits to include most upcoming program promotions. Notwithstanding the general rule that program promotions be counted toward the commercial limits, CME, *et al.* recommend that the Commission exempt promotions for core educational children's programming from the definition to air such promotions.

To improve the quality of educational programming, CME, *et al.* urge the Commission to remind broadcasters of their responsibility to exercise good faith in determining whether a children's core program has education as a significant purpose. Further, the FCC should instruct the Mass Media Bureau to investigate abuses of licensees' good faith obligation. To better promote public awareness of children's educational and informational programming, the Commission should amend the criteria for E/I programming to include promotional efforts as well as the use of a standardized E/I icon.

Finally, CME, *et al.* recommend that the FCC encourage broadcasters to refrain from airing age-inappropriate promotions during children's programming by employing the current voluntary framework of the V-Chip and the existing rating system to ensure that such promotions are not aired during children's programming.

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The Center for Media Education, Access for All, American Academy of Child and Adolescent Psychiatry, American Psychological Association, William R. Beardslee, M.D., Center for Commercial-Free Public Education, Center for Science in Public Interest, Coalition for Quality Children's Media, Consumer Federation of America, Citizens for Independent Public Broadcasting, Concerned Educators for a Safe Environment, Daniel Corley, Dads and Daughters, William J. Doherty, Ph.D., Leon Eisenberg, M.D., Ronald Hoffman, Ph.D., Junkbusters Corp., Jean Kilbourne, Ph.D., Velma Lapoint, Ph.D., Diane E. Levin, Ph.D., Karen Lewis, M.PH., Susan Linn, ED.D., Robert McChesney, Ph.D., Media Education Foundation, Mark Crispin Miller, Ph.D., Motherhood Project, National Alliance for Non-violent Programming, National Association for Elementary School Principals, National Association for Family and Community Education, National Black Child Development Institute, National Coalition on Television Violence, National Education Association, National Institute on Media and the Family, National PTA, New Mexico Media Literacy Project, Alvin F. Pouissant, M.D., Public Advocacy for Kids, Juliet Schor, Ph.D., John Surr, Betsy Taylor, and the Television Project ("CME, *et al.*"),¹ by their attorneys the Institute for Public Representation, respectfully submit these comments in response to Notice of Proposed Rule Making ("*NPRM*") in the above referenced proceeding.

¹ See Appendix for a description of the organizations making up CME, *et al.*

In the *NPRM*, the Federal Communications Commission (“FCC” or “Commission”) seeks comment on a wide range of issues concerning the obligations of digital television (“DTV”) broadcasters to serve children. *NPRM* at ¶ 1. CME, *et al.* are a coalition of national non-profit organizations, concerned individuals and academics, that have a strong interest in improving the quality of children’s electronic media and ensuring that advances in technology provide an educational and safe environment for our nation’s children.

I. THE COMMISSION SHOULD ADAPT THE EXISTING CHILDREN’S TELEVISION OBLIGATIONS OF BROADCASTERS TO FIT THE ENHANCED CAPABILITIES OF DIGITAL TELEVISION.

One of the most fundamental and longstanding public interest obligations of broadcasters is to provide programming to serve the educational and informational needs of children.² Since 1974, the Commission has emphasized that broadcasters have “a special obligation” to serve children. *1974 Policy Statement*, 50 FCC 2d at 5. In the CTA, Congress made that “special obligation” more explicit by requiring broadcasters to provide programming specifically designed to serve children’s educational and informational needs. 47 U.S.C. § 303b(a)(2).

The *NPRM* now asks how the existing children’s programming guidelines should be applied in the digital context. *NPRM* at ¶ 16. CME, *et al.* commend the Commission for seeking comment on the menu proposal presented in our comments, as well as those offered by other parties, in response to the *Public Interest Obligations of TV Broadcast Licensees*, Notice of

² See, e.g., *Policies and Rules Concerning Children’s Television Programming*, Report and Order, 11 FCC Rcd 10660, 10662 (1996) (“*1996 Children’s TV Order*”); Children’s Television Act of 1990, 47 U.S.C. § 303a-b (“CTA”); S. REP. No. 101-227, at 2 (1989) (“*CTA Senate Report*”); *Children’s Television Report and Policy Statement*, 50 FCC 2d 1, 5 (1974) *aff’d* *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Circ. 1977) (“*1974 Policy Statement*”).

Inquiry, 14 FCC Rcd 21633 (1999) (“*NOF*”). *See id.* at ¶ 22. The following section expands on our earlier recommendations, highlighting the vast opportunities offered by DTV to better serve the needs of children and providing in greater detail the “nuts and bolts” of our proposal. CME, *et al.* believe that the FCC should interpret broadcasters’ “special obligation” to capitalize on the enhanced capabilities of DTV and better address the needs of children. To do so, CME, *et al.* recommend that the Commission promulgate a new processing guideline based on a point system that gives DTV broadcasters flexibility while ensuring meaningful educational and informational services to children.

A. The Enhanced Capabilities of DTV Dictate the Need for a New Guideline for Broadcasters’ Public Interest Obligations to Children.

With the advent of digital technology, television is entering a new era. The fundamental role of broadcasters as public trustees remains unchanged in this transition to DTV.³ However, the enhanced capabilities of DTV offer new possibilities for broadcasters to better fulfill that role, particularly in regard to the educational needs of children.

As the Commission has recognized, DTV broadcasters will have the ability to air high definition TV (“HDTV”), to multicast (sending as many as 4-6 digital standard-definition TV signals), or to provide ancillary or supplementary services, including video and data distribution, data transmissions, teletext, interactive services, and “time-shifted” video programming. *NPRM* at ¶ 10. In addition, broadcasters will have unparalleled flexibility to switch between these various formats, shifting the use of the spectrum as the situation dictates. These new capabilities

³ *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12810-11 (1997) (“*Fifth Report and Order*”).

raise various possibilities for DTV broadcasters to create new, lucrative revenue streams.⁴ In fact, broadcasters are already forming partnerships to enter the digital datacasting arena.⁵ These new capabilities raise new questions concerning how broadcasters should fulfill their public interest obligations, especially with respect to children.

1. DTV presents new opportunities to better serve the educational and informational needs of children.

DTV has the potential to serve the educational and informational needs of children in new and innovative ways. For instance, a broadcaster could devote an entire channel to children's programming. Last year, for instance, PBS launched PBS KIDS, a 24-hour noncommercial digital channel comprised entirely of nonviolent and educational programs for children.⁶ Educational and informational children's programming ("E/I"), as defined by the Commission, could also be broadcast in HDTV. For example, many of the E/I programs focusing on animals and the environment would be greatly enhanced if broadcast in HDTV, offering unparalleled visual detail with cd-quality sound.⁷

⁴ See generally, Richard V. Ducey, *Internet +DTV Broadcasting = UN-TV*, at <http://www.nab.org/research/Reports/DTV-Internet.asp> (discussing the wide array of non-traditional services DTV can provide such as offering Internet bandwidth and DTV's market advantages in this area).

⁵ Glen Dickson, *IBlast Makes Datacast Splash*, BROADCASTING AND CABLE, Mar. 13, 2000, at 62.

⁶ *Public Interest Obligations of Broadcasters: En Banc Hearing Before the Federal Communications Commission*, at 48 (Oct. 16, 2000) ("*DTV En Banc Hearing*") (Statement of Patricia Nugent) available at <http://www.fcc.gov/realaudio/tr101600.pdf>.

⁷ Some nature shows, such as South Carolina Educational Television's *NatureScene*, are already being broadcast in HDTV. SCETV, *DTV: Programming*, at <http://www.scetv.org/dtv/programming.htm>. According to naturalist Rudy Mancke, one of the hosts of *NatureScene*, "[o]ur show has always been about taking people along with us for a leisurely walk through

In addition, children's educational programs can be enhanced via datacasting to provide children with additional information, answer questions, and encourage interactivity. The possibilities for these enhanced programs are only now being explored. For example, PBS's *Zoboomafoo*, a children's wildlife program geared towards preschoolers, tested an interactive version of the series last year.⁸ *Zoboomafoo*'s viewers were able to interact with on-screen animated characters, assist the on-screen hosts of the program, play an interactive on-screen game, and collect enhanced audio, video or graphical media in the form of souvenirs.⁹ DTV can also facilitate parental involvement. Interactive programs can be used to inform parents what programs their children watched, describe the lessons the program taught, and suggest possible questions for parents to ask their children.¹⁰

Datacasting can do more than just provide enhanced educational programming. Because of DTV's ability to transfer large amounts of data *via* small amounts of bandwidth, broadcasters could datacast educational content, from enhanced educational programs to electronic books, directly into homes and schools. For example, teachers could receive lesson plans, teaching tips,

nature. Now, with this enhanced technology, viewers are going to feel even more like they are right there with us. And it's not just the visual image that is enhanced; digital television also creates the ultimate audio experience." *Id.*

⁸ *DTV En Banc Hearing, Statement of Patricia Nugent*, at 48.

⁹ Press Release, PBS, *PBS and Intel Collaborate on Enhanced DTV Program for Children* (Jan. 17, 1999) (on file with author).

¹⁰ Brian Smith, Assistant Professor, The Media Laboratory, MIT, Speech at the Kids TV Goes Digital Conference (Oct. 24, 2000) (on file with author).

and video and text support for either specific DTV programs or classes in general.¹¹ Students who are unable to attend classes or are being home-schooled could receive daily lessons via interactive tutorials.¹² The possibilities for datacasting, and DTV in general, are far-reaching and exciting.

2. The three-hour guideline is insufficient in light of DTV's new opportunities.

To encourage digital broadcasters to realize these new possibilities, the Commission should change how it assesses whether broadcasters have met their public interest obligations to children. In the analog environment, the Commission has relied upon the three-hour children's core educational programming processing guideline. *1996 Children's TV Order*, 11 FCC Rcd at 10718. However, CME, *et al.* believe that the three-hour guideline will not be sufficient for DTV. When the guideline was developed, the technological possibilities presented by DTV were not taken into account. The ability of television stations to multicast, interact with the viewer, and datacast were not considered. The guideline was based upon the reality of only one channel per broadcaster. Obviously, that reality is about to change, and broadcasters' obligations to children should change with it.

Fundamentally, the three-hour guideline resulted from a compromise dictated by what was considered feasible in analog. It reflects an amount of E/I programming that was clearly attainable at the time it was created and an attempt to balance the needs of children with those of

¹¹ PBS, *PBS Digital Television: Teachers and Learners*, at <http://www.pbs.org/digitaltv/teach2.html>.

¹² PBS, *PBS Digital Television: Teachers and Learners*, at <http://www.pbs.org/digitaltv/teach1.html#diana>.

other viewers in a single channel environment. *1996 Children's TV Order*, 11 FCC Rcd at 10719-21. Although the processing guideline was a significant improvement over the prior lax enforcement of the CTA, it does not fully address children's diverse needs.

Children make up over 1/4 of the U.S. population.¹³ Three hours per station is not enough programming to satisfy the programming needs of all age groups. For instance, commercial broadcasters air very little programming for preschoolers, despite the fact that preschoolers make up one third of the US child population.¹⁴ Similarly, there is evidence indicating that more programs are targeted towards boys rather than girls.¹⁵ E/I programming also tends to focus on social-emotional needs rather than teaching academic subjects such as reading, science and math.¹⁶ Finally, E/I programs with a local or community focus are extremely rare.¹⁷ In short, even with the three-hour guideline, many educational needs of children are underserved or ignored. DTV presents an opportunity to fill those needs currently unaddressed by analog television stations.

¹³ ChildStats.gov, *Population & Family Characteristics*, at <http://www.childstats.gov/ac2000/poptxt.asp>. According to the U.S. Census Bureau, there were 70.2 million children below the age of 18 in the United States as of 1999, making up 26 percent of the population. *Id.*

¹⁴ Amy B. Jordan, *Is the Three Hour Rule Living up to its Potential?: An Analysis of Educational Television for Children in the 1999/2000 Broadcast Season*, ANNENBERG PUBLIC POLICY CENTER 17 (2000).

¹⁵ Mark R. Barner, *Sex-Role Stereotyping in FCC-Mandated Children's Educational Television*, JOURNAL OF BROADCASTING & ELECTRONIC MEDIA, Sept. 22, 1999, at 43.

¹⁶ Kelly L. Schmitt, *The Three-Hour Rule: Is it Living Up to Expectations*, ANNENBERG PUBLIC POLICY CENTER 3 (1999) (finding that 75% of the core programming provided by the major networks was social programming aimed at elementary school-age children).

¹⁷ Jordan, *supra* note 14, at 7.

B. The FCC Should Adopt a Point System that Provides Broadcasters the Flexibility to Adapt their Public Interest Obligations to the DTV Environment in a Meaningful Way.

To better address the diverse needs of children and to capitalize on the opportunities presented by DTV, CME, *et al.* recommend that the FCC create a new processing guideline based on a point system. The new point system guideline would be in addition to the current three hour guideline which would apply only to the “primary” channel. *See Fifth Report and Order*, 12 FCC Rcd at 12830.¹⁸

The point system would provide broadcasters with a set of flexible options for fulfilling their public interest obligations. Under this proposal, the FCC would credit a broadcaster with points for (1) airing additional E/I programming; (2) funding children’s educational programming on a local public TV station; and/or (3) providing “non-broadcast efforts” such as datacasting for local schools. These options closely follow the categories set forth by Congress in the CTA.¹⁹

¹⁸ CME, *et al.* does not advocate extending the three-hour guideline to require three hours on every program stream. *NPRM* at ¶ 15. Practically speaking, the fact that broadcasters will likely be adjusting the number and the type of program stream available on a regular basis will make it difficult to define a program stream. Broadcasting E/I programming on pay streams is also problematic. Some pay streams may not be appropriate forums for children of any age, especially if the pay streams are carrying adult or violent content. In addition, certain channels are simply not effective ways to reach children because they target an adult audience. For these reasons, the FCC should develop a different kind of guideline for assessing whether digital TV stations have served the educational and informational needs of children on channels other than the primary channel.

¹⁹ Specifically, the CTA instructed the FCC to consider during renewal application procedures, how licensees served the educational and informational needs of children through: (1) the broadcaster’s own programming designed to educate children; (2) efforts by the broadcaster to support the educational programming of another broadcaster in the same marketplace; and (3) “nonbroadcast efforts” that enhance the value of children’s programming. 47 U.S.C. § 303b.

1. DTV Broadcasters could earn points for providing additional E/I programming.

Under the point system, the Commission could award points for each half-hour of weekly E/I programming aired by the broadcaster beyond its three hours on the primary channel. For example, the Commission could allocate 2 points for every additional program. Providing broadcasters with the option of airing additional E/I programming directly implements broadcasters' obligation to serve "the educational and information needs of children through the licensee's overall programming." 47 U.S.C. §303b(a)(2). More E/I programming clearly serves the public interest, as it would encourage broadcasters to address the needs of children that are not being met under the current three-hour guideline. Broadcasters could choose to implement this option in a variety of ways. For instance, a broadcaster could follow PBS's lead and dedicate one multicast stream to children's and E/I programming.

To encourage experimentation with DTV's interactivity and to the enhance the educational experiences of children, the FCC could also award extra credit for E/I programming with educational interactive applications. As discussed above, interactive components can help children better understand a problem, answer potential questions, or even involve parents in the learning process. Moreover, without an incentive, there is a significant danger that E/I programming could be relegated to the least advanced portion of the spectrum.²⁰ The FCC could also award extra credit for additional local E/I programming. Local E/I programming has largely disappeared since adoption of the three-hour guideline, and further incentives are needed to encourage broadcasters to air this valuable programming. Jordan, *supra* note 14, at 7.

²⁰ See *Comments of Children Now*, MM Dkt. No. 99-360, filed Mar. 27, 2000, at 35. Children Now's DVEQ rule specifically addresses this problem.

2. DTV Broadcasters could earn points for funding children's educational programming.

A digital licensee could also earn points for funding children's E/I programming on a local public TV station. The CTA encourages the FCC to take into account efforts the broadcaster has made to support E/I programming on other stations. 47 U.S.C. §303b(b)(2). Despite this provision, CME, *et al.* are unaware of any broadcaster that has chosen this option. Broadcasters may be wary of attempting this option because there is no guideline clarifying what efforts would be enough to satisfy their obligation. The proposed point system provides a mechanism for quantifying those efforts.

Under the point system, the Commission could credit a broadcaster for providing a local public TV station funding for the production of educational programming. Points would be based on a percentage of the broadcaster's gross annual revenue. For example, the FCC could allocate 2 points for every one tenth of one percent (0.1%) of a licensee's gross revenue a broadcaster pays to a local public television station (or invests in a fund such as the now inactive National Endowment of Children's Programming). This option could result in significant additional funding for PBS stations that already have the plans and the incentive to provide high quality, digitally-enhanced educational children's programming. As the testimony from the *DTV En Banc Hearing* demonstrates, the need for funding for PBS is crucial to its capability to continue to provide quality programming in the digital environment.²¹

Basing points on a percentage of annual gross revenues is both fair and administratively feasible. Recently, the Commission decided to use annual gross revenues for assessing fees for

²¹ *DTV En Banc Hearing, Statement of Patricia Nugent*, at 49.

digital ancillary or supplemental services.²² Virtually all of the commenters in that proceeding supported a fee based upon the gross revenues of the ancillary services, agreeing with the FCC that a such a fee methodology would be the simplest to calculate and enforce. *Id.* at 3264.²³

3. DTV Broadcasters could earn points for providing free datacasting services to local schools.

The point system could also allot broadcasters credit for providing free datacasting services to local schools. Section 303b(b)(1) encourages the Commission to consider “non-broadcast efforts” the licensee has undertaken to better serve the educational and informational needs of children. In light of the significant potential educational applications offered by datacasting, CME, *et al.* recommend that the Commission count datacasting to local schools toward a broadcaster’s public interest obligations.²⁴

Datacasting technology can be a great benefit to children. *See* discussion *supra* Part I.A.1. For example, broadcasters can use datacasting to bridge the digital divide that exists in urban and rural areas by helping schools get connected. Broadcasters could develop datacasting plans “to transmit course-related materials, such as lesson plans and teacher and student guides, as part of instructional video programming.” *Advisory Committee Report* at 54. Teachers could

²² *Fees for Ancillary or Supplementary Use of Digital Television Spectrum*, 14 FCC Rcd 3259, 3264-66 (1998) (“*Ancillary Services Order*”), *recon. denied*, 14 FCC Rcd 19931 (1999).

²³ The Commission also used gross revenues for assessing carrier fees. *Assessment and Collection of Regulatory Fee for Fiscal Year 1995*, 10 FCC Rcd 13512, 13558 (1995). The FCC found that basing fees on annual gross revenues was a fair, neutral, predictable and easily verifiable methodology. *Id.*

²⁴ *Advisory Committee on Public Interest Obligations of Digital Television Broadcasters: Charting the Digital Broadcasting Future*, Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters, 53-54 (1998) (“*Advisory Committee Report*”).

incorporate interactive distance learning programs concerning archaeological digs or ecological tours into their lesson plans. In addition, the *Advisory Committee Report* noted that datacasting consumes little bandwidth, generally less than one percent of the total 6 MHz spectrum provided to each broadcaster. *Id.* Awarding broadcasters credit for entering into datacasting partnerships/agreements with local schools would further both localism and educating children.

There are several different approaches the Commission could take to incorporate datacasting into the point system. The FCC could credit a number of points for datacasting services valued at a certain percentage of a broadcaster's gross annual revenue. For example, the Commission could award 2 points for every one tenth of one percent (0.1%) worth of datacasting services a licensee provides to local schools. Alternatively, the FCC could assign points on the basis of a percentage of the bitstream used to provide datacasting services to local schools. For instance, the FCC could award a broadcaster 2 points for every one megabyte it grants to local schools for datacasting services. Regardless of the methodology selected, datacasting provides a great opportunity to be an important part of broadcasters' public interest obligations to children, and its potential should be fully explored by the Commission.

4. How the point system guideline would work.

A broadcaster would be required to file an annual form with the Commission describing how it had met its point threshold in the previous calendar year.²⁵ When its license comes up for

²⁵ The FCC requires similar annual reporting requirements concerning DTV broadcasters' provision of ancillary or supplemental service. *See Ancillary Services Order*, 14 FCC Rcd at 3275-76 (requiring DTV licensees to file annual reports concerning use of ancillary or supplemental services). Similarly, the FCC also requires broadcasters to maintain an annual EEO report in their public file detailing how they have complied with the FCC's EEO rules. *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, 2333 (2000)

renewal, the Mass Media Bureau staff would review the broadcaster's previous annual point system filings to see if it had complied with the guidelines. If a broadcaster meets the threshold number of points established by the Commission, the staff would presumptively conclude that the licensee had met its obligation to serve the educational and informational needs of children as required by 47 U.S.C. §303b. If the broadcaster did not meet the threshold, the full Commission would review the broadcaster's actions to determine whether its efforts were sufficient to justify renewal.

To illustrate how a point system might work, we have provided an example incorporating the aforementioned categories. In this example, the point threshold is set at 20 points per year:

Example Point System Guideline	
<u>Options:</u>	<u>Points:</u>
<u>Airing Additional E/I Children's Programming</u>	
• Air an additional half hour of E/I programming	2 pts
• Air an additional half hour of E/I programming with interactive educational applications	3 pts
• Air an additional half hour of locally originated or locally oriented E/I programming.	3 pts
<u>Funding the Production or Purchase of Children's E/I Programming on Local Public Television Stations</u>	
• Provide 0.1% of the licensee's annual gross revenues to a local public television station for the purpose of producing or purchasing E/I programming	2 pts
<u>Providing Datacasting Services to Local Schools</u>	
• Provide a local school(s) with datacasting services worth 0.1% of the licensee's annual gross revenues	2 pts

("EEO Order"), *recon. denied*, FCC 00-338 (rel. Nov. 22, 2000).

The point system provides DTV broadcasters with wide discretion to determine how they could satisfy their obligations under the CTA. For instance, using the above example, a broadcaster could decide to air ten additional E/I programs to comply with the 20 point threshold. Alternatively, a broadcaster could choose to satisfy its entire obligation by providing a local PBS station with 1% of the licensee's gross revenue to produce or purchase E/I programming. Finally, a broadcaster could craft a combination of two or more categories, airing some additional E/I programming, providing some funding for a local PBS station, and/or providing datacasting services to local schools. Each station would be able to decide for itself how it would satisfy its public interest obligations to children based on its knowledge of the local community's needs and the resources at its disposal.

5. A point system is a flexible, fair and efficient, method to ensure that DTV broadcasters serve the educational needs of children.

The Commission has ample precedent for using a point system to assess whether DTV broadcasters have met their obligations to children. For example, the Commission recently adopted a point system for selecting among mutually exclusive applications for non-commercial educational ("NCE") licensees.²⁶ The FCC selected a point system over other methods because it provided a balance of objectivity, substantive review, efficiency, low costs and predictability. *NCE Order*, 15 FCC Rcd at 7394. The FCC determined that selecting NCE applicants based on a point system "eliminate[d] the vagueness and unpredictability of the [prior] system." *Id.* A point system also "clearly express[ed] the public interest factors that the Commission [found] important in NCE broadcasters" and selected the applicant who best exemplified the

²⁶ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) ("*NCE Order*").

Commission's public interest criteria. *Id.*

The benefits identified in the *NCE Order* supporting the adopting of a point system are equally applicable here. For instance, a point system would provide clarity and predictability to DTV broadcasters. It would also assist the Commission to "clearly express the public interest factors" it finds important to determine whether a broadcaster has served the educational needs of children.

In another recent decision, the Commission adopted a menu approach for assessing whether a licensee has fulfilled its EEO obligations. *EEO Order*, 15 FCC Rcd 2329. The Commission determined that "it is desirable to accord broadcasters flexibility in designing outreach programs that are tailored to the needs of their station and community." *Id.* at 2363. The Commission concluded that it would "give broadcasters discretion to determine what combination of recruitment sources will yield broad and inclusive outreach." *Id.* at 2364. With these goals in mind, the FCC crafted a two-tier menu system offering broadcasters a wide selection of options to draw from in each menu to satisfy their fundamental obligation to inform all members of their communities of job openings. *Id.* at 2364-2365.

The proposed point system is very similar to Option A of the EEO rules.²⁷ The point system is premised on affording DTV broadcasters *flexibility* in determining how to meet their obligation to serve children's educational needs. Like the EEO menu, the point system grants a

²⁷ Option A provides broadcasters with a "menu of options for supplemental recruitment initiatives, which will enable broadcasters to select the approaches they believe will be most effective." *EEO Order*, 15 FCC Rcd at 2372. The menu offers broadcasters thirteen options to choose from, ranging from hosting at least one job fair to the establishment of an internship program. *Id.* at 2372-2373. Broadcasters with more than ten employees must implement four of the options every two years. *Id.* Broadcaster with less must implement two very two years. *Id.*

broadcaster wide *discretion* in determining what combination of services would best serve the children of its community and be most compatible with its available resources. In addition to its flexibility, the point system is easy to administer and ensures that every licensee is doing its fair share.²⁸

In sum, DTV presents great opportunities to better serve the educational and informational needs of children. These opportunities will only be fully realized if the FCC adapts the current three-hour guideline to take advantage of the enhanced capabilities of DTV. The proposed point system sets specific quantitative guidelines that ensures an adequate amount of resources will be committed to serving the educational needs of children in the DTV environment. At the same time, a point system processing guideline provides a broadcaster with the flexibility to use its capabilities to best serve the children of its community, while providing the licensee with a bright-line guide so that it can be confident that it has fulfilled its obligations.

II. THE COMMISSION SHOULD ADOPT STRONG PREEMPTION STANDARDS FOR BOTH ANALOG AND DIGITAL TELEVISION.

Because digital and analog broadcasters will continue to provide some quantity of E/I programming, the Commission must clarify how often a program can be preempted and still be considered a “regularly scheduled” E/I program as required by the FCC’s rules. The *NPRM* asks whether the Commission should revise its preemption policies. *NPRM* at ¶ 28. CME, *et al.* urge the Commission to revise its preemption policies for both analog and digital television.

²⁸ See 1996 *Children’s TV Order*, 11 FCC Rcd at 10663 (“a processing guideline will help ensure that broadcasters who wish to provide an ample amount of children’s educational programming, will not find themselves at an unfair advantage in the market relative to competing broadcasters who do not, and will not find themselves facing competitive pressure to forgo educational programs.”)

Specifically, the Commission should establish a cap, which would take effect the next television season, on the number of times a program could be preempted and still count towards the E/I programming guideline. As digital technology gives broadcasters the flexibility to schedule around the regularly scheduled E/I programs, however, the need for any preemptions will be virtually eliminated.

A. The FCC Should Set a Cap on the Number of Times a Program can be Preempted and Still Count Toward the E/I Programming Guideline.

To qualify as an E/I program for the purposes of the current three-hour processing guideline, the Commission requires that such programming be “regularly scheduled.” *1996 Children’s TV Order*, 11 FCC Rcd at 10709. Regularly scheduled is further defined as being programming that is “scheduled to air at least once a week” and “air[s] on a regular basis.” *Id.* at 10711. As the Commission has recognized, programs aired on a regular basis are more easily anticipated and located by viewers, thus building loyalty that improves the chances the programs will be commercially viable. *NPRM* at ¶ 25.

Preemption has been a consistent problem since the inception of the guidelines.²⁹ The large number of preemptions of E/I programming frustrates the building of an audience for E/I programming, which is a central concern of the Commission. *NPRM* at ¶ 28. Studies indicate that children (and parents) need to have a sense that the programs they want to watch will

²⁹ See FCC Mass Media Bureau, *The Effect of Preemption on Children’s Educational and Informational Programming 1997-1998 Television Season*, DA 98-2306 (1998) (“1997-1998 Bureau Preemption Report”).

consistently be aired at the expected time.³⁰

A recent survey by the Mass Media Bureau staff demonstrates that preemption is still a major problem, as the average preemption rate by stations affiliated with the largest networks during the past two years was nearly 10%, and has been as high as 25% during quarters when networks have a large number of sports programming commitments. *NPRM* at ¶ 28. *CME, et al.* commend the FCC on the recent changes to FCC Form 398 that will allow the Commission to create a record detailing these program preemptions and the reasons behind each preemption.³¹ However, despite these improvements, no definitive rule exists for broadcasters to follow regarding preemptions.

CME, et al. believe that the Commission should set a bright-line rule for the staff to use in determining whether a children's educational program qualifies as regularly scheduled for purposes of the guideline. We suggest that if a program is preempted more than two times out of the typical 13 week quarter (or more than 15% of the time), that program should not count toward the three-hour processing guideline.³² This bright line rule will allow broadcasters to plan

³⁰ See, e.g. Jordan, *supra* note 14, at 28 (concluding that "[t]he frequent preemption of educational shows on the weekend, evidenced by a visible minority of stations, illustrates a lack of sustained commitment to addressing the needs and interests of the child audience. It is worrisome when E/I programs are knocked out of the Saturday lineups. This is often the only time set aside on the networks for children's programs, a fact that reveals a minimal interest in the child audience and the programming that is supposed to be a part of their public interest obligation. It may therefore be important for the FCC to put clearer guidelines into place to limit the flexibility stations now have in their educational program scheduling.").

³¹ *Extension of the Filing Requirement For Children's Television Programming Reports*, Report and Order, MM Dkt No. 00-44 (Oct. 5, 2000) ("*Children's TV Programming Reports Order*").

³² The cap should apply separately to each program. Nationwide or even station-wide preemption rates are largely irrelevant since some programs are preempted at a far higher rate,

ahead and schedule their programming accordingly. Where stations preempt E/I programming, they should reschedule it to a “second home.” Stations should be required to publicize the rescheduled program in advance of the event. Preemptions for “breaking news” should still be permitted. However, the Commission should define “breaking news” as an unscheduled event. If a station knows about an event at least one week in advance, then the event should not be considered “breaking news.” This will avoid abuses observed in the past, such as claiming that a parade or rodeo was “breaking news.”

B. Given Broadcasters Additional Flexibility Due to Multicasting, Preemption of E/I Programming should be Eliminated for DTV.

With the switch to digital television, it should not be necessary, in the vast majority of cases, to allow any preemptions of children’s E/I programming.³³ Multicasting will enable stations to run multiple streams of programming at the same time, thus giving stations the ability to show both E/I programming and other content at the same time. Avoiding preemptions simply becomes a matter of broadcasting sports or breaking news on different streams than the regularly scheduled E/I programming.

usually due to competition from sporting events. *See Comments of CME, et al.*, DA 99-1484, filed Sept. 24, 1999.

³³ If a broadcaster chooses to broadcast only a single HDTV signal, then the analog rules should continue to apply. However, technology will soon be able to address this problem, and allow limited multicasting during HDTV broadcasts. *See Bill McConnell, Target marketing with DTV*, BROADCASTING AND CABLE, Nov. 6, 2000, at 46 (discussing a new channel-changing feature that allows viewers to choose between several parallel program streams).

III. CHILDREN'S ADVERTISING LIMITS AND POLICIES SHOULD APPLY TO BOTH FREE AND PAY DIGITAL PROGRAM STREAMS.

In addition to ensuring that digital broadcast licensees meet the educational and informational needs of children, the FCC should ensure that DTV licensees do not engage in excessive and unfair advertising in children's programs. The *NPRM* seeks comment on CME, *et al.*'s recommendation that children's advertising limits and policies apply to all DTV programming aimed at children regardless of whether the program is on a free or pay stream. *NPRM* at ¶ 31. CME, *et al.* strongly reiterate our belief that the existing commercial limits and policies for children's television should apply to all video programs directed at children 12 and under. As discussed below, advertising concerns in children's programs are relevant to all digital programming, whether free or pay. It is for this reason that Congress and the Commission have consistently applied advertising policies equally to broadcast and cable television. Finally, Congress clearly intended for pay digital channels to be subject to the public interest, convenience and necessity.

A. The Commission's Advertising Safeguards Should Apply to DTV Broadcasters' Ancillary or Supplemental Services to Ensure that these Services do not Abrogate the Public Interest.

Advertising limits and policies were developed to protect children from excessive advertising and unfair commercial practices. Research has consistently demonstrated that children are more trusting and susceptible to commercial persuasion than adults.³⁴ These

³⁴ See generally, Dale Kunkel, *Children's Television Advertising In The Multichannel Environment*, 42 J. COMM. 134 (1992) (content analysis of the advertising contained in children's programming); Dale Kunkel, *et al.*, *Young Minds and Marketplace Values: Issues in Children's Television*, 47 J. SOC. ISS. 57 (1991); Dale Kunkel, *Children and Television Advertising*, in HANDBOOK OF CHILDREN AND MEDIA 375 (Dorothy G. Singer & Jerome L. Singer ed., 2000) (providing a comprehensive review of existing research and findings concerning children's

concerns do not depend on the platform the program is delivered.³⁵

In 1974, the FCC adopted several policies aimed at protecting children from unfair and excessive advertising practices. The policies were premised on the “common understanding [that], because of their youth and inexperience, children are far more trusting and vulnerable to commercial ‘pitches’ than adults.” *1974 Policy Statement*, 50 FCC 2d at 11. The Commission explained that protections were necessary because “children lack the necessary sophistication to appreciate the nature and purpose of advertising.” *Id.* at ¶ 47. Congress later relied on the FCC’s findings and policies when it adopted the commercial advertising limits in the CTA.³⁶ Moreover, finding that the incentives for overcommercialization of children’s programs were great on both free broadcast and pay cable television services, Congress extended the commercial limits to cable as well.³⁷

The concerns identified in the 1974 Policy Statement and the CTA are equally applicable to DTV programming whether a children’s program is aired over a free or pay stream. The

limitations in understanding commercial messages).

³⁵ See generally, Kunkel, *Children and Television Advertising*, *supra* note 34.

³⁶ The legislative history of the CTA indicated that the FCC has never “received any substantial or reliable evidence that the rationale and facts underlying its 1974 Report are no longer valid.” *CTA Senate Report* at 3. The rationale is that “most young children are unable to distinguish commercial matter from program matter, and they are especially vulnerable to commercial matter.” *Id.* at 10.

³⁷ The CTA requires the FCC to create a set of rules limiting the amount of time that “commercial television broadcast licensees” can devote to commercial matter in conjunction with children’s programming. 47 U.S.C. § 303a(a). Cable television operators, are specifically included in the definition of “commercial television broadcast licensees,” and thus subject to advertising limits. 47 U.S.C. § 303a(d).

CTA's advertising limits apply to both free broadcast TV and pay cable TV because "the same rationale for restricting commercial matter during children's programming on over-the-air television applies to such programming on cable television." *CTA Senate Report* at 10. Thus, exempting DTV pay program streams from the advertising limits and policies would frustrate the intent of the CTA.

In addition, the Commission has applied its advertising rules to cable, as well as to broadcast television. For instance, the FCC applies its program-length commercial policy to both broadcast and cable programs for children.³⁸ Further, in developing the sponsorship identification rules and regulations, the FCC did not make a distinction between cable and broadcast television. Indeed, the FCC's promulgated sponsorship identification rules apply to all cable operators engaged in cable origination programming. 47 C.F.R. § 76.1615(h) (2000).

B. The Communications Act Dictates That DTV's Ancillary And Supplementary Services Be In the Public Interest.

The Communications Act dictates that pay program streams comply with the children's advertising limits and policies. In allocating free digital spectrum to incumbent broadcast licensees, Congress made clear that television broadcast stations were still obligated to serve the public interest, convenience, and necessity. 47 U.S.C. § 336(d). Specifically, Congress stipulated that in order to renew "a broadcast license for a television station that provides *ancillary or supplementary services*, the television licensee shall establish that *all of its program services on the existing or advanced television spectrum* are in the public interest." *Id.* (emphasis

³⁸ *Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies*, Report and Order, 6 FCC Rcd 2111, 2126 n.127 (1991) ("1991 Children's TV Order"), *recon. denied*, 6 FCC Rcd 5093 (1991) ("1991 Children's TV Recon Order").

added). A pay program stream is considered an ancillary and supplementary service. *Fifth Report and Order*, 12 FCC Rcd at 12876.³⁹ Therefore, if a broadcast licensee offers children's programming on a pay stream, those programs must be in the public interest. Programs that are intended for children, yet do not comply with the advertising limits or commercial policies, are *per se* not in the public interest because they expose children to excessive and abusive advertising practices. For these reasons, the existing advertising limits and policies must apply to all programming aimed at children regardless of whether the program is free or pay.

IV. THE COMMISSION SHOULD ADOPT COMMERCIAL SAFEGUARDS TO PROTECT CHILDREN FROM UNFAIR AND DECEPTIVE INTERACTIVE COMMERCIAL PRACTICES IN DIGITAL TELEVISION.

The Commission also seeks comment on how the existing children's television policies regarding program-commercial separation, host-selling, and program-length commercials, developed with analog technology in mind, should be applied to DTV. *NPRM* at ¶ 12. In applying these policies to DTV, the Commission must take into account the interactive capabilities of digital technology. As discussed below, the interactive capabilities of DTV raise a host of advertising concerns. CME, *et al.* continue to believe that a prohibition against direct linking from children's programming, and commercials aired during such programming, is a necessary first step to protect children from these excessive, abusive and unfair practices. *Id.* at ¶ 32.⁴⁰

³⁹ Ancillary or supplementary services are defined as including subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service (not an exhaustive list). *Id.*

⁴⁰ CME, *et al.* strongly believe that the harm interactive advertising poses to children is equally serious regardless of the medium a children's program is aired on. CME, *et al.* therefore